

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

SCOTT M. EPSTEIN,

Plaintiff,

v.

C.R. BARD, INC., *et al.*,

Defendants.

Civil Action No. 03 CV 12297 (RWZ)

**BARD'S RESPONSE TO PLAINTIFF'S MOTION FOR LEAVE TO FILE A REPLY TO  
BARD'S OPPOSITION TO PLAINTIFF'S MOTION TO STAY**

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COUNSEL FOR DEFENDANT  
C.R. BARD, INC.

Bard requests leave of Court to file this response to Plaintiff's Motion for Leave to File a Reply to Bard's Opposition to Plaintiff's Motion for Stay ["Mot."] to correct two inaccurate statements therein.

Epstein asserts that "On August 11, 2004, Bard assented to Plaintiff's Motion to Stay" (Mot. at 2) and "On August 25, 2004, Bard filed a response to Plaintiff's Motion for Stay in direct contravention to their prior assent." (*Id.*) Both statements are inaccurate. Here are the facts:

1. In a telephone conversation in early August (before August 11), George MacInnis (of Lambert & Associates) told counsel for Bard (Attorney Matthew Zisow) that Attorney Lambert had been called to active duty in Iraq. Mr. MacInnis requested that Bard agree to an unspecified stay. Counsel for Bard indicated Bard would likely assent to some sort of stay under the circumstances, and that it would be appropriate to discuss the issue with the Court at the August 18, 2004 scheduling conference.

2. On August 11, 2004, Mr. MacInnis again called Attorney Zisow. Mr. MacInnis reported that he had been in touch with Attorney Lambert in Iraq, and that Attorney Lambert had instructed him to file a written motion to stay in court before the scheduling conference. Mr. MacInnis again requested Bard's assent to an unspecified stay. Attorney Zisow indicated that Bard would likely assent to some sort of stay, and that Mr. MacInnis should send Attorney Zisow Epstein's motion before filing it in court so that Bard could review the specifics of Epstein's request. Instead, Epstein's counsel filed his "Partially Assented To Motion to Stay all Proceedings" in court on August 11, 2004. Counsel for Bard first received a copy of the filed motion in the mail the next day.

3. The scheduling conference took place in chambers on August 18, 2004. Shortly before the conference, Attorney Zisow approached Attorney Archibald and Mr. MacInnis in the

courtroom. Attorney Zisow told them that their motion contained several previously un-discussed requests to which Bard had not assented and would not assent. Attorney Archibald and Mr. MacInnis stated that they understood.

4. During the scheduling conference, the Court observed that the time to oppose pending motions (Epstein's motion to stay and Futuremed/Crossbow's motions for final judgment) had not yet lapsed. The Court directed the parties to file their respective oppositions by the applicable deadlines (Aug. 25 for the stay; Aug. 26 for the 54(b) motions), after which it would either rule on the papers or schedule a further hearing. As for the stay issue, the Court noted that although Attorney Lambert "anticipates" returning in February or March, 2005, his actual return date is substantially unpredictable.

Bard therefore timely filed its Partial Opposition to Plaintiff's Motion to Stay. Bard assented to a stay of reasonable and certain – not protracted and indefinite – duration. This position is consistent with what Bard's counsel told Mr. MacInnis in early August.

Respectfully Submitted,

C.R. BARD, INC.

By its counsel,

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Attorneys for C.R. Bard, Inc.

DATED: September 14, 2004

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the above document was served upon each attorney of record on September 14, 2004 by first-class mail.

/s/ Matthew Zisow

Matthew Zisow

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